ECOS

THE
ENVIRONMENTAL
COUNCIL OF
THE STATES

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Peter Silva
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
Washington, DC

Re: Improvements in Section 404 Assumption Processes

The Environmental Council of the States (ECOS) proposes to work with the U.S. Environmental Protection Agency (EPA), the States, other key agencies, and State associations to establish a streamlined process for State assumption of the Section 404 Program. Only two States have taken over the Section 404 program, over the last 30+ years, while nearly all other delegable programs are now run by States under EPA oversight. ECOS has passed resolutions supporting improvements in Section 404 delegation, which are attached.

Section 404 assumption by States should be at least as protective of resources as the program administered at the federal level. But the application process needs to be streamlined so that the delegated federal program represents the foundation that States are able to add to and build upon. For example, a State should be able to regulate activities not regulated at the federal level or to focus on avoiding, minimizing and denying permit applications if the State decides that mitigation is not a reliable option.

One of barriers to State Section 404 delegation is that the application process is perceived as both ambiguous in some areas and inflexible in others. This creates uncertainty concerning what revisions or additions States need to make to existing laws, regulations and programs to achieve delegation.

Parts of assumption that are ambiguous include compliance with the Endangered Species Act, the National Environmental Policy Act, and other federal laws. In addition there should be clarity with respect to what kinds of authority are equivalent to the commerce clause and other authorities under federal law that don't apply within State government, but that the State must somehow satisfy. Another area of uncertainty is whether a delegated program must provide for citizen suits.

Parts of assumption that are perceived as inflexible include compliance with the 404(b)(1) guidelines, criminal and civil enforcement authorities and penalties. Also the statute and regulations seem to indicate that program delegation must occur within a 24 hour period, which makes staged implementation nearly impossible. Michigan (which assumed the program before many obstacles arose) started with a pilot program. States might also plan to take over the program in a limited geographical area, expanding its geographic scope over a logical time period.

ECOS proposes the following process:

1. A small group including EPA, ECOS, the Association of State Wetland Managers (ASWM) and 1 or 2 States that have assumed or have worked on an assumption application should work together to identify the areas that should be addressed, reporting back to the Partnership Council of the Office of Water and States (PCOWS) periodically.

2. A larger group including other key federal agencies and other EPA programs engaged in approving an assumption package should participate in a process to identify all steps in completing an assumption application and identify and eliminate areas of redundancy, ambiguity or inflexibility The group also should identify areas that are lacking in guidance or in need of additional executive, administrative or legal clarification.

3. Revise, clarify and simplify the application process and provide a guidance document that States can use to develop an assumption application.

4. Conduct other related improvements identified by PCOWS.

We look forward to working with you on this matter. Please contact us or Steve Brown at ECOS directly if there are any questions.

Sincerely,

Thomas W. Easterly (IN)
Chair
ECOS Water Committee

Lucy C. Edmondson (MA)
Vice Chair

ECOS

Resolution Number 08-3
Approved April 14, 2008
New Orleans, LA

As Certified by
R. Steven Brown
Executive Director

STATE DELEGATION OF CLEAN WATER ACT SECTION 404 PERMIT PROGRAM

WHEREAS, States have the ability to assume jurisdiction over Section 404 permit programs under the Clean Water Act but in only two cases have sought and assumed the program; and,

WHEREAS States' goals are to maintain wetland protection, achieve consistency in program administration, and streamline the federal permit process; and,

WHEREAS States who assume the federal Section 404 permitting program are prohibited from receiving federal funding for implementation; and,

WHEREAS States that develop state wetland permit programs using federal EPA wetlands development grants are not eligible for EPA wetland grants to implement their state wetlands permit programs.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Supports delegation of Section 404 responsibilities to States.

Encourages USEPA to develop clear guidelines and processes for State assumption of Section 404 of the Clean Water Act that will encourage states to apply for and assume regulatory responsibility over this important natural resource program.

Supports Congressional action to authorize and appropriate adequate funding for States that assume the Section 404 permitting program and to broaden the eligibility of the existing EPA wetland grant program for both development and implementation activities.

Supports a simplified and more flexible process for State assumption of the Section 404 Permit Program, including partial assumption of program responsibilities, in order to improve effectiveness and provide more efficient and effective permitting for applicants while maintaining protection of wetlands in the United States.

ECOS

Resolution Number 08-2
Approved April 14, 2008
New Orleans, LA

As Certified by
R. Steven Brown
Executive Director

CLEAN WATER ACT JURISDICTION ISSUES REQUIRE CLARIFICATION FROM CONGRESS

WHEREAS, the Environmental Council of States strongly supports the Clean Water Act of 1972 and subsequent amendments, the Act's historical protections for the "waters of the United States;" and the important federal, state, and local government partnerships created by the Act in order to "restore and maintain the chemical, physical, and biological integrity of the nation's waters," and,

WHEREAS, the U.S. Supreme Court's SWANCC and Carabell/Rapanos decisions have more narrowly interpreted the scope of the Clean Water Act's (CWA) protections and create uncertainty in jurisdiction for all Clean Water Act programs; and,

WHEREAS, the waters (whose protections are jeopardized by the Supreme Court decisions and federal policy guidance and represent over 50% of U.S stream miles in the lower 48 states and an estimated 20 million acres of wetlands, both according to US Environmental Protection Agency estimates) are critical to achieving the goals of the Clean Water Act; and,

WHEREAS, States believe that failing to continue to exercise broad jurisdiction under the Clean Water Act would result in substantial losses to the quality and quantity of the nation's waters; and,

WHEREAS, the issuance by the U.S. Corps of Engineers and U.S. Environmental Protection Agency of supplementary guidance concerning Clean Water Act jurisdiction has not alleviated confusion, has further complicated all permitting programs established by the Clean Water Act, jeopardizes protections for intermittent and ephemeral streams and wetlands, and has added substantial delay to valid permit actions; and,

WHEREAS, States that have developed and implemented their own wetland rules both prior to and in response to the SWANCC and Carabell/Rapanos decisions are undermined by the continued confusion at the Federal level; and,

WHEREAS, State programs and laws are significantly intertwined with the Clean Water Act, which established minimum protections for "waters of the U.S." and over a third of States are prohibited from protecting water not covered by the Clean Water Act.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES:

Supports continued and consistent federal wetlands jurisdiction.

Supports a simplified and more flexible process for State assumption of the Section 404 Program, including partial assumption of program responsibilities, in order to assist with the restoration of clarity regarding the

scope of regulated wetlands and other waters, and to provide protection against continued confusion at the Federal level.

Agrees that some form of congressional action is needed to eliminate confusion, provide clarity concerning Clean Water Act jurisdiction, restore jurisdiction under the Clean Water Act to broadly protect the waters of the United States, and support protection of those waters historically protected and properly identified in the longstanding USEPA and Corps regulations (40 CFR 122.2 and 33 CFR 328.3) including "all waters which are subject to the ebb and flow of the tide; all interstate waters, including interstate "wetlands;" all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds; all impoundments, tributaries, and "wetlands" adjacent to these waters; and the territorial seas."

Encourages the U.S. Congress to act immediately to reestablish Clean Water Act jurisdiction to the full scope of waters protected prior to the recent Supreme Court decisions, and to work in cooperation with ECOS and other interested organizations to resolve Clean Water Act jurisdiction issues.